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Customary International Law and its Interpretation in International Tax and Investment Law

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Groningen
The Netherlands

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Universiteit
Leiden
The Netherlands

Welcome by the organizers

Dear participants,

The organizing committee warmly welcomes you to the Workshop ‘Customary International Law and its Interpretation in International Tax and Investment Law’. In international law, interpretation is ubiquitous. Whereas in the application of treaties the process of interpretation is one that always yields a solution, with respect to customary international law (CIL) these rules of interpretation have not been examined, despite the fact that it has been and remains the object of multiple studies and of application by almost all courts and tribunals. Evidently in the study of CIL there is a lacuna in understanding how CIL once it has been formed, continues to exist and is interpreted, and what is the nature and content of those interpretative rules.

In light of these developments and evolving views, this workshop aims to initiate a debate on the challenges and opportunities presented by CIL and its interpretation in two main fields, i.e. international tax law, and international investment law.

This conference is a cooperation of two European Research Council (ERC) Projects: TRICI-LAW researching on “The Rules of Interpretation of Customary International Law” and GLOBTAXGOV researching on “A New Model of Global Governance in International Tax Law Making”.

We would like to thank the ERC for its valuable contribution to making this event possible.

Warm regards
The organizing committee

University of Groningen
Prof. Panos Merkouris
Principal Investigator of TRICI-Law

Leiden University
Dr. Irma Johanna Mosquera Valderrama
Principal Investigator of GLOBTAXGOV

Workshop programme

13.00 - 13.30 Registration

13.30 - 14.00 Welcome and Introduction to the TRICI-Law and GLOBTAXGOV projects

14.00 - 15.00 **Panel 1:**

CIL and its Interpretation in International Investment Law

Chair: Marcel Brus

Panelists:

- Diego Mejia-Lemos: *Identifying and Interpreting CIL in International Investment Law: General Issues*
- Emily Sipiorski: *The Interpretation of Good Faith Performance in International Investment Law: Additions to Justice?*
- Javier García Olmedo: *The Relevance of CIL and its Interpretation to the Standing of Dual Nationals under IIAs*
- Cees Verburg: *Quantifying Damages in Energy Related Investment Arbitrations: Interpreting and Applying Rules of CIL Regarding State Responsibility*

15.00 - 15.30 Q&A

15.30 - 16.00 Coffee Break

16.00 - 17.00 **Panel 2: CIL and its Interpretation in International Tax Law**

Chair: Irene Burgers

Panelists:

- Frederik Heitmüller: *Actors in International Tax Law Making and Customary Law Formation*
- Tarcísio Diniz Magalhães: *The MLI's Conference of the Parties as an Opportunity for True International Tax Multilateralism*
- Dirk Broekhuijsen: *The Impact of the MLI: International Tax Law and CIL Ripple Effects*
- Irma Johanna Mosquera Valderrama: *The Principle Purpose Test in MLI and International Law: Its Interpretation and CIL Status*

17.00 - 17.30 Q&A

Organizers



Panos Merkouris

(PhD, Queen Mary, University of London) is Professor and Chair on Interpretation and Dispute Settlement in International Law at the University of Groningen, the Netherlands. His areas of expertise are law of treaties, customary international law, sources, and international dispute settlement. He is Principal Investigator of the ERC project TRICI-Law.

TRICI-Law

TRICI-Law is a 5-year ERC Starting Grant project. The acronym stands for “The Rules of Interpretation of Customary International Law”.

Customary international law (CIL) is one of the formal sources of international law and together with treaties are the most important ones, creating binding rules of international law. Some of the most crucial rules of international law started and continue to exist as CIL. The issue with CIL, however, is that it is an unwritten source of international law. Its existence is determined inductively through examination of two elements, state practice and *opinio juris* (acceptance as law).

Whereas in the application of treaties the process of interpretation is one that always yields a solution, with respect to CIL these rules of interpretation have not been examined. This leads to one of the following two paradoxical scenarios. Either CIL needs to be induced each and every time, by reference to state practice and *opinio juris* (but this is extremely problematic as it fails to take into account the continued existence, development and manifestation of CIL rules); or, even worse, CIL is asserted by international judges. But assertion, essentially means that international judges create law: they become law-makers and exercise a power to legislate (*pouvoir de légiférer*). Evidently in the study of CIL there is a critical gap in understanding how CIL can be applied in individual cases once it has been formed. TRICI-Law thus aims to prove that even in the case of this unwritten source, i.e. customary international law (CIL), there are rules of interpretation similar to those that exist for the interpretation of treaties, and to determine the content of these rules.



Dr. Irma Johanna Mosquera Valderrama is Associate Professor of Tax Law at Leiden University, the Netherlands. In 2007, Irma Mosquera obtained her PhD (cum laude) at the University of Groningen, the Netherlands. Her areas of expertise are international tax law and comparative tax law in developed and developing countries and more recently exchange of information including taxpayers' rights and safeguards in exchange of information, and BEPS related issues in developing countries. She has been recently is the Principal Investigator of the ERC research project on a New Model of Global Governance in International Tax Law Making (GLOBTAXGOV).

GLOBTAXGOV

The ERC funded research project aims to assess the feasibility and legitimacy of the current model of global tax governance, and the role of the OECD and EU in international tax law-making. The role of the EU and OECD is of increasing significance as governments and organizations struggle to tackle artificial profit shifting by multinationals and bid to increase domestic resource mobilization to achieve post-2015 Sustainable Development Goals (SDGs). This therefore necessitates the need for this project to be multi-disciplinary in nature, touching upon themes not only confined to tax law and practices.

Are the EU and OECD legitimate actors to set rules for all countries, irrelevant of their situation and status as either developing or developed? Are the rules that they proscribe enforced in the same manner across different countries in different regions, and how do these new rules fit into a new framework and environment of international global tax governance. This project will seek to research these questions and go further still in order to create a new reference and evaluation framework for global tax governance.

Chairs



Marcel Brus is professor of Public International Law, chair of the Department of Transboundary Legal Studies (Faculty of Law), chair of the Department of Social Sciences (University College Groningen) and Academic Director of the LL.M. Programme in International Law & the Law of International Organisations and the LL.B. Programme in International and European Law at the University of Groningen.

Before his appointment on 1 September 2005, he was senior lecturer in Public International Law at Leiden University, where he started his academic career in 1986 as Ph.D. researcher. He graduated from the University of Groningen in 1984 with a specialisation in International Law. After graduation he participated in various postgraduate courses, among others at the Institute of Social Studies in The Hague and at the Netherlands Institute for International Relations “Clingendael” in The Hague. In 1995 he defended his doctoral thesis “Third party dispute settlement in an interdependent world; developing a theoretical framework” cum laude at Leiden University.

Between 1997 and 2002 he taught at Oxford University when he combined his post at Leiden University with the joint Leiden-Oxford Post in Public International Law. He has been active as research co-ordinator of the E.M. Meijers Institute of Legal Studies of the Leiden Law Faculty. He was a member of the editorial board of the Leiden Journal of International Law (1989- 2009 and Editor-in-Chief from 2003-2005) and of the Netherlands Yearbook of International Law (1998-2008).

From 2001-2013 he was a member (and in 2012-13 the chair) of the Advisory Committee on Questions of Public International Law (CAVV), advising the Dutch Government and Parliament. From 2003 to 2012 he was Hon. Secretary of the Royal Netherlands Society of International Law.

Currently he is Director of Studies of the International Law Association (ILA), member of the editorial board of the Netherlands International Law Review and board member of the Royal Netherlands Society of International Law . His research concentrates on the interaction between international law and politics, the development of international law as a system of law, international environmental law and sustainable development, international investment law and international dispute settlement. From 2012 until the beginning of 2017 he was programme director together with Prof. M.M. Roggenkamp of the research programme “Energy and Sustainability” of the Groningen Law Faculty.



Irene.J.J. Burgers (1962, Deventer, the Netherlands) is Professor of International Tax Law at the Faculty of Law of the University of Groningen and Professor of Economics of Taxation at the Faculty of Economics and Business of the University of Groningen.

She graduated in 1985 in Economics of Taxation as well as in Business Economics at the University of Groningen and took her doctorate at this University in Tax Law with a dissertation entitled “The allocation of fiscal profits to branches of internationally operating banking enterprises”. For this dissertation she was awarded the Mitchell. B Carroll Prize 1992, an award granted by the International Fiscal Association for the best work devoted to international tax law.

Irene Burgers interests focus on tax aspects of doing international business. She teaches courses on International Tax Law, European Tax law, Tax Policy, Taxation of Business Profits and Tax Risk Management and is a frequent speaker at congresses.

She wrote more than 250 publications and frequently lectures on these issues. She was national reporter for the IFA-conference in Geneva (1996, Principles for the determination of the income and capital of permanent establishments and their applications to banks, insurance companies and other financial institutions), national reporter and speaker for the conferences of the Institute

for Austrian and International Tax Law 2008 (The History of Double Tax Conventions) and 2010 (the impact of the OECD and UN Model Tax Conventions on bilateral tax treaties), speaker and member of the panel at the IFA-Conferences in Vienna (2004, Double non-taxation) and Paris (2011, Immovable property), speaker and member of the panel at the EATLP-congres 2013 (Funding Tax Research) and speaker at the conference of the DeStaT Research Group (CapeTown, 2014, The relevance of Dutch court decisions for the interpretation of tax treaties for other states).

Besides international and European tax law she has interest in Energy Tax Law and in Tax Accounting and Control. She published on the Energy Taxation Directive RL 2003/96/EG and was speaker at conferences on Sustainability and Energy. She teaches Tax Risk Management and published articles on transfer pricing comparing the tax perspective with the management control perspective.

She practiced tax law as tax adviser with PricewaterhouseCoopers. Furthermore she was one of the independent persons for the EU Arbitration Committee (1995 – 2013). She is Member of the Board of the Canadian Studies Centre of the University of Groningen and a member of the Groningen Centre of Energy Law.

Speakers and abstracts



Diego Mejía-Lemos (PhD, LL.M., National University of Singapore (NUS); LL.M., New York University) is a Post-Doctoral Fellow at NUS. He has held positions in academia and practice. Recently, at the Permanent Court of Arbitration (PCA), in The Hague, he provided support to investment treaty arbitrations conducted under the PCA's auspices. He is managing editor of *The Global Community: Yearbook of International Law and Jurisprudence* (OUP).

Identifying and Interpreting CIL in International Investment Law: General Issues

The presentation discusses a set of general issues concerning the identification and interpretation of customary international law (CIL) rules in international investment law. It proceeds in three parts.

Part I, by way of introduction, briefly reviews the state of the art on CIL in general international law. Among other topics, it discusses the interaction between the processes of identification and interpretation of CIL rules. In particular, it analyses instances where interpretation arguably plays what has been called an “existential” role, where a determination as to the existence of custom (and the respective CIL rule) may be conflated with the interpretation of its content.

Part II discusses issues concerning the identification of CIL in international investment law. It discusses both relevant current trends in state practice, particularly by reference to the bilateral investment treaty (BIT) practice of selected states, among other international investment treaties, and the practice of arbitral tribunals constituted under BITs. It argues that BIT practice shows an increasing interest of states parties in providing more specific criteria for the identification of CIL (eg Nigeria/Singapore BIT Art 3). This might be due, as with other uses of CIL in investment treaty arbitration, in response to a perceived lack of consistency in the practice of arbitral tribunals.

Part III, building on the analysis provided in Part I, discusses selected instances of interpretation of CIL rules in investment treaty arbitration. In particular, it focuses on issues which might arise out of arbitral tribunals' uses of codificatory instruments such as those prepared by the United Nations International Law Commission (ILC). In particular, it discusses general issues concerning the use of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARS) in investment treaty arbitrations, and contrasts arbitral tribunals' uses of the ARS with those of selected non codified CIL rules.



Emily Sipiorski is a Senior Researcher at the University of Hamburg, Department of Socioeconomics, Faculty of Law. She is the author of *Good Faith in International Investment Arbitration* that will be coming out in February 2019 in the *Oxford International Arbitration Series*. She is an expert in international investment law and investment arbitration on which she has written extensively.

The Interpretation of Good Faith Performance in International Investment Law: Additions to Justice?

A state's obligation to respect treaty commitments in good faith is both part of customary international law as well as included in the Vienna Convention on the Law of Treaties. Although this obligation exists, international investment tribunals have substantial discretion as to when and how good faith is required of the state. Despite all of the controversy and change now characterizing international investment protection, the value given to arbitral interpretation of provisions remains intact. As good faith never functions on its own but always in relation to another obligation—and typically not explicitly—arbitrators have a central role in interpreting this behavioural requirement, giving life to its reality, and using it in achieving certain ends.

Drawing from several recent investment decisions in which tribunals required good-faith behaviour, thus enabling a higher standard of behaviour of the state, the presentation examines its use and value in investment disputes and the role of the arbitral voice.

The presentation first confronts the differences in value given to good-faith behaviour from one arbitrator to another, or from one tribunal to another. In practice, this manifests in the decision to include requirements or exclude any additions, also revealing differences in an arbitrator's relationship with international law in general. Second, as a highly subjective principle, good faith has an amorphous shape and different nuances are applied in its interpretation. The presentation explores how interpretation of the provisions is impacted and standards for conduct are heightened or lowered by inclusion of an additional good faith requirement. In examining the inclusion of good-faith behavioural requirements, the varied and unpredictable application reveals certain inconsistencies within the interpretation of treaty provisions from one dispute to another, but also exposes underlying value and benefits to the system of international investment law more generally.



Javier García Olmedo is a Research Fellow at the Max Planck Institute for International, European and Regulatory Procedural Law and an Associate Lecturer at Queen Mary, University of London. Javier holds a Master's Degree in Law from the University of Granada (Spain) and an LL.M. in Private International Law and Arbitration from King's College London. Before joining the Institute, Javier was an associate in the International Arbitration Group of Hogan Lovells in Paris, and practiced arbitration with Freshfields Bruckhaus Deringer in Paris, and worked as a research assistant for Professor Martin Hunter at Essex Court Chambers in London.

The Relevance of CIL and its Interpretation to the Standing of Dual Nationals under IIAs

Nationality plays a key role in investor-state arbitration. Most IIAs extend personal jurisdiction only to nationals of the home state party. This rule largely derives from customary international law, which entitles a state to protect its nationals when harmed by wrongful acts committed by other states. Possessing the nationality of the espousing state is not however sufficient to oppose a nationality to the respondent state.

Customary international law imposes certain restrictions in cases where an individual seeking protection via his or her state of nationality is simultaneously a national of the respondent state. There are two rules of customary law regulating the standing of dual nationals that co-exist in parallel: the rule of non-responsibility and the rule of dominant and effective nationality. Most investment treaties do not incorporate any of two these rules. Exceptions can be found in the ICSID Convention, which has imported the rule of non-responsibility by excluding host state nationals from the Centre's jurisdiction irrespective of issues of dominance and effectiveness. Other treaties, such as the Dominican Republic-Central America Free Trade Agreement, are less restrictive and allows a dual national to bring a claim only if the individual investor maintains a stronger connection with the home state, thereby importing the rule of dominant and effective nationality.

The question however arises whether the absence of an IIA provision excluding or limiting claims by dual nationals implies an agreement by the contracting parties to be sued by their own nationals before a non-ICSID tribunal. This contribution examines a recent line of investment jurisprudence that has addressed this question, looking at how arbitrators have responded to arguments by states that silence of an IIA on the standing of dual nationals compels the application of customary international law. This task will require first analysing the position of arbitrators with respect to the interpretation of nationality requirements in IIAs by reference to the VCLT. It will then require examining to what extent arbitrators have interpreted the customary rule of non-responsibility and the rule of dominant and effective nationality.

The overall argument of this contribution is that investors should not be permitted to make their states of nationality respondent before an investment tribunal on the ground that there is no treaty provision to the contrary. Arbitral tribunals are empowered, indeed bound, to apply customary international law on the standing of dual nationals to prevent treaty abuse by investors who are truly foreign.



Cees Verburg (LL.M. University of Edinburgh; LL.M. University of Groningen) is a PhD candidate at the Groningen Centre of Energy Law of the University of Groningen. His research interests include international energy law, international investment law and international arbitration. He teaches a course on international investment law at the University of Groningen and is occasionally involved in advisory work related to investment law and arbitration.

Quantifying Damages in Energy Related Investment Arbitrations: Interpreting and Applying Rules of CIL Regarding State Responsibility

What is the applicable norm of international law once an investment tribunal has established that a host State has violated its obligations under an international investment agreement (IIA) vis-à-vis the investor? Chances are, the applicable IIA is completely silent on this topic since IIA's do not usually contain a specific regime on liability and State responsibility. Nevertheless, this question holds the answer to the 'million dollar question' or, and that is not uncommon in energy related investment arbitrations, the 'billion dollar question'. For example, how come the Russian oil company Yukos was 'only' awarded EUR 1.9 billion in the proceedings before the European Court of Human Rights for various violations of the European Convention on Human Rights while the majority shareholders of Yukos, which held approximately 60 percent of the shares in the company, obtained USD 50 billion in a series of cases brought under the Energy Charter Treaty?

Since IIA's are usually silent on these issues, tribunals have to interpret and apply rules of customary international law, as codified in the ILC Draft Articles on State Responsibility. In Art. 31 of the Draft Articles one will find that '[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.' This norm was already pronounced by the Permanent Court of International Justice in the 1928 the Factory at Chorzów case. Most often, but not always, investment tribunals will start their analysis by stating that the 'full reparation' norm applies. This is often followed by the interpretation and application of the norm.

The presentation will focus on how investment tribunals, specifically those operating under the Energy Charter Treaty, have interpreted and applied the full reparation norm in case the applicable investment treaty has been violated by the State. Specific emphasis will be on the interpretive tools employed by tribunals to give content to the 'full reparation' norm.



Frederik Heitmüller is a PhD candidate in the *GLOBTAXGOV* project at Leiden University's Institute for Tax Law and Economics. He graduated in 2017 from a binational Franco-German study program in political and social sciences at the University of Stuttgart and Sciences Po Bordeaux with a master's thesis on the international political economy of taxation. He has interned at the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) and was appointed as researcher at the Tax Justice Network, before joining the *GLOBTAXGOV* project.

Actors in International Tax Law Making and Customary Law Formation

While the interpretation of both written and customary law lies within the realm of doctrinal research, one of the main contributions of sociological and political approaches lies in providing answers to the following question: Why is the law as we find it at a given point in time? In this sense, I will examine the role that different societal actors play in the formation of international tax law and illustrate this with the example of the transplantation of the Base Erosion and Profit Shifting (BEPS) Minimum Standards into legal practice in different countries. The BEPS minimum standards were drafted by the OECD, endorsed by the G20 and more than 80 third states around the world as a response to a public outcry over aggressive tax planning strategies used by multinational enterprises. By reviewing previous literature as well as comments on the BEPS standards that have been written by various parties, I will describe 1) who the actors are that influence international tax law making, 2) what preferences they articulate, 3) how they interact with each other and which channels of influence they make use of, and 4) how the actors are in turn influenced by their institutional environment.

Thereby, I adopt a perspective rooted in “actor-centric institutionalism”. This framework is characterized by a compromise between according explanatory value to the intentional actions of rational actors on the one hand and institutions in which these actors’ are embedded on the other hand. Further, it puts attention primarily on actors at a meso-level, which means that it neither focuses on individuals nor large-scale organizations such as states but on organizations at the intermediate level (firms, bureaucracies, etc.).

I will show that contemporary international tax law and legal transplants of international tax standards into various countries are outcomes of a highly complex actor constellation, characterized by a multi-level setting (with international, domestic and transnational actors), many diverging interests but a fair amount of shared norms among many actors as well.

This analysis lays out a basis for the more granular case studies of the implementation of the BEPS minimum standards that will be conducted by the European Research Council-funded GLOBTAXGOV project in 12 different OECD- and non-OECD countries.



Tarcísio Diniz Magalhães is a postdoctoral research fellow at IBFD. He holds a doctoral and master’s degree in Law and Justice (Tax Law), from the Federal University of Minas Gerais (UFMG), under full scholarships. During his PhD studies, he was granted full scholarships to conduct research at McGill University (H. Heward Stikeman Chair in the Law of Taxation), IBFD, Wirtschaftsuniversität Wien (Institute for Austrian and International Tax Law) and Max Planck (Institute for Tax

Law and Public Finance).

Since 2015, he has been an official member of the Permanent Commission on Review and Simplification of Tax Legislation of the State of Minas Gerais.

The MLI's Conference of the Parties as an Opportunity for True International Tax Multilateralism

This presentation's overall purpose is to explore the pro-multilateralism narrative in international tax law, as framed by the OECD after BEPS, specifically in light of the MLI. Not in a purely descriptive fashion, but rather via a critical and broader perspective placed within the framework of normative international tax policy and public international law. Taken from an interdisciplinary standpoint, the aim hereinafter is to reach into terrains outside traditional treaty analysis, so as to contribute with a deepened and nuanced understanding of the dynamics of the global taxation game.

As such, I start by raising questions as to the extent to which the multilateral instrument could be really considered an expression of renewed multilateral fiscal relations. I maintain that this new international arrangement amounts, at best, to a form of "weak multilateralism", in spite of having resulted from transnational tax policy negotiations that were somewhat more inclusive than the BEPS initiative. The argument is twofold. First, even though the MLI was devised by a larger group of countries, the mandate for its development made sure to restrict its scope to putting into practice the OECD-based Action Plan. Second, the MLI was never intended to replace the bilateral treaty network, creating a single uniform global tax regime with substantive rules (as envisioned in the past); on the contrary, it was designed to be applied alongside Covered Tax Agreements, modifying only their application.

Despite these structural deficiencies, in terms of both input and output legitimacy, I believe we can still try to work with the MLI, instead of against it, in order to improve our international tax order. Put differently, it is possible to argue that, notwithstanding the fact that the existence of a collective arrangement is not the same as promoting substantive multilateral governance, the MLI could, in the end, be strategically used towards achieving true international tax multilateralism going forward. In what follows, I advance an interpretation of the amending procedure (based on Articles 31 and 33 of the MLI and Parts II and IV of the Vienna Convention) that stresses the importance of the Conference of the Parties (COP) as an international custom for more democratically legitimate and inclusive law making.



Dirk Broekhuijsen (1987) studied Tax Law at Leiden University and Law at Durham University (UK, cum laude). In 2017, he defended his PhD thesis “A Multilateral Tax Treaty” at Leiden University, which was awarded the biennial Dissertation Prize of the Dutch Association for Tax Sciences. Currently, he works as a lecturer in tax law at Leiden Law School and as tax policy advisor at the Dutch Ministry of Finance.

The Impact of the MLI: International Tax Law and CIL Ripple Effects

Traditionally, international tax law consists of bilateral, reciprocal arrangements between states. As States comply and follow standards set out in international tax treaties due to their economic advantages (and not due to their unwritten “legal” character), customary law is absent from this traditional, bilateral system of international tax law. The question is whether the adoption and ratification of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (the “MLI” or “multilateral instrument”) will change this.

For international custom to arise, it is first and foremost necessary that (new) norms of international tax law are internalized and then applied by states not on a consequentialist, but on a value-driven basis. This requires, at a minimum, two constructive elements of international cooperation: repeated interaction, and an open, transparent and equal forum for discussions. Without these elements, customary international tax law is unlikely to develop.



Dr. Irma Johanna Mosquera Valderrama is Associate Professor of Tax Law at Leiden University, the Netherlands. In 2007, Irma Mosquera obtained her PhD (cum laude) at the University of Groningen, the Netherlands. Her areas of expertise are international tax law and comparative tax law in developed and developing countries and more recently exchange of information including taxpayers’ rights and safeguards in exchange of information, and BEPS related issues in

developing countries.

She has been recently is the Principal Investigator of the ERC research project on a New Model of Global Governance in International Tax Law Making.

The Principle Purpose Test in MLI and International Law: Its Interpretation and CIL Status

With the aim to tackle to tackle base erosion and profit shifting practices (BEPS) by multinationals, the Organization for Economic Cooperation and Development (OECD) with the political support of the G20 introduced the BEPS Project including 15 Actions. From the 15 Actions, 4 have been identified as Minimum Standards including Action 6. In general, this Action 6 aims to prevent treaty shopping and aggressive tax planning by introducing the principal purpose test as a minimum standard to be included in tax treaties. The principal purpose test results in the denial of treaty benefits, if the tax administration can reasonable conclude in accordance to the facts and circumstances that one of the principal purposes for the transaction was to obtain a tax treaty benefit.

Since the BEPS 4 Minimum Standards was adopted by the OECD and G20 countries (i.e. 44 countries), there were concerns of legitimacy of these standards in respect of non-OECD, non G20 countries. To address the concerns of legitimacy, the OECD developed two initiatives. The first one was to invite in 2016 non-OECD, non G20- countries to participate as BEPS Associate in the BEPS Inclusive Framework to implement the BEPS 4 Minimum Standards (as of February 2019, 128 countries). The second initiative was the negotiation of a Multilateral Convention signed in 2017 (in force since June 2018) to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the MLI) which includes also BEPS Action 6. Like the BEPS the MLI has a global effect since (as of February 2019) 87 countries have signed the MLI.

In general, it can be argued that the BEPS 4 Minimum Standards (for the countries who have not signed the MLI), are soft law thus not legally binding; however, there is an expectation that they will be implemented by the jurisdictions that are currently participating in the BEPS Inclusive Framework. These countries have a peer review schedule for the implementation of the BEPS 4 Minimum Standards, and if these Minimum Standards have not been

implemented, the OECD will give a negative review which may also have consequences for the country mainly due to the peer review pressure. In light of these developments, this paper aims to analyze the application and problems of interpretation of the Principal Purpose Test vis-à-vis countries that are members of the BEPS Inclusive Framework (but have not signed the MLI) and to find out whether this Principal Purpose Test interpretation can have a customary international law (CIL) Status.

